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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

NO. 909

IN THE MATTER OF:
LOUISIANA LOAN AND THRIFT CORPORATION,

JOHN M. HOLAHAN,

Petitioner,

versus

ALBERT G. REYNOLDS, Trustee,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

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PETITION FOR CERTIORARI

The petition of John M. Holahan, with respect, says:

REPORTS OF OPINIONS

There are no official or unofficial reports as yet of the opinions handed down in this matter. All opinions of the Referee in Bankruptcy, the Judge of the Reviewing District Court, and the Court of Appeal, original and per curiam opinion and refusal of rehearing are found in full following.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued its original opinion herein on August 27, 1969, and, after timely application for rehearing was denied, issued an additional per curiam dated October 6, 1969, denying such application for rehearing.

On November 3, 1969, the United States Court of Appeals for the Fifth Circuit, after request therefor, recalled its mandate to the District Court and continued the stay in force until application to the Supreme Court on or before December 3, 1969, and thereafter until disposition by such court.

The statutory provision which confers jurisdiction on this court to review this matter is found in United States Code, 18: 1254 and in section 24(c) of the Bankruptcy Act (U.S.C. 11:47).

QUESTIONS FOR REVIEW

In accordance with the Rule 30(b) of the Federal Rules of Appellate Procedure, petitioner caused to be made a part of the appendix the following statement of the issue:

> "Is the scope of a section 60(d) (U.S.C. 11:96d) proceeding under the Bankruptcy Act limited to services of the attorney for the bankrupt rendered prior to the filing of the bankruptcy proceedings, or should the review envisioned by the section be to determine the reasonableness of the fee paid for previous services rendered by the attorney and services to be rendered by him after such filing."

An additional and no less important question presented herein is whether a Court of Appeal can deny an oral argument to an appellant without his consent, and does such denial amount to a denial of due process of law or violate federal law. This issue was raised by petitioner in the Court of Appeal in his application for rehearing. No mention was made by the Court of Appeal of the issue in its per curiam denial of rehearing.

STATUTES INVOLVED

The interpretation and application of section 60d. (U.S.C. 11:96d) of the Bankruptcy Act is the only substantive statute involved in this matter. It reads

"If a debtor shall directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney at law, for services rendered or to be rendered, the transaction may be examined by the court on its own motion or shall be examined by the court on petition of the trustee or any creditor and shall be held valid only to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate.

"If, whether before or after filing, a debtor shall agree orally or in writing to pay money or transfer property to an attorney at law after the filing, the transaction may be examined by the court on its own motion or shall be examined by the court on petition of the bankrupt made prior to discharge and shall be held valid only to the extent of a reasonable amount to be determined by the court, and any excess obligation shall be canceled, or if excess payment or transfer has been made, returned to the bankrupt."

The procedural statutes are U. S.C. 18:46c and 28:2071.

STATEMENT OF THE CASE

John M. Holahan, the appellant herein, was paid as a legal fee the sum of $20,000.00 by Louisiana Loan & Thrift Corporation. The scope of the services rendered and to be rendered by Mr. Holahan as attorney for the debtor corporation was as stated in the amendment to the schedules quoted in the appendix at page 117.

"John M. Holahan, attorney, paid a retainer for services and representation required by Louisiana Loan & Thrift Corporation as debtor prior to filing and in contemplation of further services required after filing as debtor and as attorney for the debtor in possession operating the business. Such amount includes costs. $20,000.00"

On June 20, 1968, the then receiver of the debtor corporation filed proceeding under Section 60(d) of the Bankruptcy Act (Appendix at page 11) in which he prayed:

> ..."that said transaction be examined; that the reasonableness of said payment be determined; that the excess over such reasonable amount be held invalid; that said excess be recovered by petitioner and that petitioner have such other and further relief as is just."

At the Section 60d proceeding, prior to hearing any testimony or receiving any evidence, the Referee stated:

> "You may present whatever services he has rendered either before or after [filing]. In my determining whether or not the fee is reasonable, I am only going to take into consideration the services rendered which were prior to the filing of the Chapter XI proceeding." (Appendix at page 14).

It is this position and the ruling that ultimately issued therefrom that forms the basis of the issue above stated.

At the hearing on the motion to examine the reasonableness of the fee, extensive testimonial evidence was adduced as to services rendered by Mr. Holahan both before and after filing the petition for arrangement under Chapter XI of the Bankruptcy Act (Appendix at pages 15 through 85), including expert testimony as to the reasonableness of the legal fee received by Mr. Holahan for such services (Appendix at pages 86 through 96).

FEDERAL JURISDICTION

The Bankruptcy Act is a federal act and administered by the federal courts and itself contains the basis for federal jurisdiction.

ARGUMENT

On lack of opportunity to orally argue:

On December 6, 1968, the Fifth Circuit issued as part of its court rules, Rule 18.

It says:

SUMMARY CALENDAR

(a) Whenever the court, sua sponte or on suggestion of a party, concludes that a case is of such character as not justify oral argument, the case may be placed on the summary calendar.

(b) A separate summary calendar will be maintained for those cases to be considered without oral argument. Cases will be considered without oral argument. Cases will be placed on the summary calendar by the clerk, pursuant to directions from the court.

(c) Notice in writing shall be given to the parties or their counsel of the transfer of the case to the summary calendar.

Without suggestion of any party to this proceeding, the court, sua sponte, placed this matter on its summary calendar, and, after giving the notice called for in paragraph (c) decided the case without affording the appellant the opportunity to be heard in oral argument.

The appellant at the first opportunity available to him complained in his petition for rehearing of the denial of oral argument.

U.S.C. 18:46c pertaining to courts

of appeal says:

> "Cases and controversies shall be heard and determined by a court . . ."Emphasis supplied.

The rule-making power of the Court of Appeal cannot be inconsistant with the Acts of Congress which set up such courts. U.S.C. 28:2071.

In adopting its no hearing rule, without an opportunity to be heard being afforded to the parties on the question, this Court in effect has authorized for itself what amounts to writ jurisdiction when the law requires the Court to entertain appeals which heretofore have always included an oral argument. It is submitted that justice is better served with an oral argument where the parties have better opportunity to emphasize their important points and clarify with ease the positions taken. Indeed frequently within the oral argument lies the keystone of help to the Court in reaching its decision.

The appellant can indeed sympathize with the Court and its overwhelming case load. The answers to these problems should be provided by Congress and should not be provided at the expense of rights long recognized as belonging to parties on appeal.

The Rules of this Fifth Court insist on further and further refinement of the issues that come before it. But, as in any refinement process, much of matter is lost. Petitioner suggests that to define out of the rights to an appeal an oral argument is an emasculation of too great

a part of the appeal process.

While the instant matter seemingly involves law only, the questions posed for determination are complex. They involve not only Section 60d (U.S.C. 11:96c) as amended in 1963, but the practice, history and interpretation of other decisions regarding attorney fees in bankruptcy proceedings. In the oral argument, questions from the panel frequently serve to enlighten the panel in regard to the facts before it, the scope of the review sought by the petitioner and other relevant matters such as the facts and holdings in prior decisions relied upon for support or rebuttal.

To deny oral argument to the parties is unmistakably a departure from the accepted and usual course of an appeal. This Court should exercise its power of supervision by granting a writ herein to thoroughly review the right of the Court of Appeal, acting on its own, to deny oral argument in an appeal.

On the merits:

Section 60d, of the Bankruptcy Act is not ambiguous. Its intent is apparent. Its object is to subject an attorney's fee to a standard of reasonableness. The questions concerning its application have been interpreted by lesser courts and, through a series of misreadings, equating results with procedure, interpretation of dicta, and misapprehension of the intent of this statute and its correlation with Section 64a, have forced what is clear into the grotesque; and instead of allowing a bankrupt or debtor

to make provision for payment of a reasonable fee to his attorney in anticipation of the bankruptcy proceeding which will strip him of his property, the interpretation of the Fifth Circuit accomplishes the opposite result - it denies the right of a bankrupt or debtor to pay his attorney a reasonable fee for the services "to be rendered" in the proceedings.

The Court of Appeal erred when it used as a basis of its ruling, one paragraph taken out of context from the complete and correct interpretation of Section 60d handed down by this Court in Conrad, Rubin & Lesser v. Pender, 289 U.S. 472, 53 S. Ct. 703 (1933). It erred by adapting a finding of fact expressed by the Second Circuit in In Re Buchanan, 2d Cir, 1933, 66 F.2d 416, that "in practice" the services envisioned in Section 60d relate only to pre-filing services. In Buchanan no claim was made for post-filing services. Obviously where no claim was made for post-filing services, none should be considered. It erred in its finding that Pratt v. Bothe, 6th Cir., 1904, 130 F. 670, is still the law in such circuit in view of the amendments to Section 60d and this court's pronouncement in Conrad, supra. It erred in its reading of In re Autocue Sales & Distributing Corp. S.D.N. Y., 1958, 167 F. Supp. 672, which is not a Section 60d case, since payment of the fee took place after filing and therefore could not be valid. And it erred in limiting the scope of appellant's review before it, in affirming the arbitrary valuation placed on appellant's services.

The Referee wrote an opinion and

findings of fact and law coincident with the rendition of the order of August 7, 1968. In such the Referee states:

> "The sole question involved in this 60d proceeding is a determination by this Court of the reasonable value of the services rendered by Mr. Holahan prior to the filing of the Chapter XI proceeding." Emphasis supplied. (Appendix at page 118)

And in the conclusion the Referee states:

> "The Court is further of the opinion that an allowance of a fee at this time can only cover the reasonable value of services rendered by Mr. Holahan prior to the filing of the petition for a Chapter XI proceeding, and that any application for fees for services rendered subsequent to the Chapter XI filing either as attorney for the debtor in possession or as attorney for the debtor must necessarily be made in the future, either after the confirmation of a plan or after an adjudication and administration of the estate." (Appendix at page 119).

And in addition in his certificate says:

> "That the question presented by this review is whether the referee erred in his determination that the payment of $20,000

> to John M. Holahan was valid only to the extent of $3,000 for services actually rendered prior to the filing of the Chapter XI proceeding, and that the sum of $17,000 be paid forthwith to John A. Bennett, Receiver, for the benefit of the estate." (Appendix at page 5).

At the hearing the Referee announced that he would not consider in his determination of reasonableness any services "to be rendered" by counsel, nor would he consider services "rendered" by counsel at the date of hearing on this 60d proceeding, but would only consider services rendered prior to filing the proceeding on April 24, 1968. The Referee did however admit evidence concerning the services rendered after filing and to be rendered.

Attorney's fees charged for and received by those representing bankrupts are dealt with under Section 60d of the Bankruptcy Act. Section 60d (11 U.S.C.A. 96d) reads as follows:

> "60d If a debtor shall, directly or indirectly, in <u>contemplation of the filing of a petition</u> by or against him, pay money or transfer property to an attorney at law, <u>for services rendered or to be rendered, the transaction may be examined by the court</u> on its own motion or shall be examined by the court on petition of the trustee or any creditor and shall

be held valid only to the extent of a reasonable amount to be determined by the Court, and the excess may be recovered by the trustee for the benefit of the estate.

"If, whether before or after filing, a debtor shall agree orally or in writing to pay money or transfer property to an attorney at law after the filing, the transaction may be examined by the court on its own motion or shall be examined by the court on petition of the bankrupt made prior to discharge and shall be held valid only to the extent of a reasonable amount to be determined by the court, and any excess obligation shall be canceled, or if excess payment or transfer has been made, returned to the bankrupt." (Emphasis added)

Section 60d contains nothing which indicates that a cutoff date of filing is intended to apply. The substance of the section is to allow the Court the opportunity of adjusting the fee the attorney for the bankrupt received for services rendered and to be rendered to the end that such fee meet the standard of reasonableness.

In 9 Am. Jur. 2d, Bankruptcy §1016, the correct interpretation of 60d is found:

> "A payment of money or transfer of property by a debtor to his counsel, made in contemplation of bankruptcy and of services to be rendered in the proceeding by counsel, is indirectly recognized by the Bankruptcy Act to be valid to the extent that it is reasonable."

The only occasion for the United States Supreme Court to comprehensively review and set forth its appraisal of the applicability of Section 60d was in Conrad, Rubin and Lesser v. Pender, supra. In that case the bankrupt corporation made a payment to its attorneys prior to the filing of an involuntary petition. The attorneys involved defended only by denying the jurisdiction of the court by merely asserting that the payment made was for services "not germane to the bankruptcy act" and, therefore, there existed no jurisdiction to inqure. The attorneys made no claim for services rendered or yet to be rendered after filing; indeed, they refused to take part in the proceedings and no evidence of any post-filing services was had. The Court ordered a return of part, allowing $500.00 for services actually rendered. See In re David Bell Scarves, Inc., 61 F. 2d 771, 22 Am. B.R. (N.S.) 39 (1932). Certiorari was granted and the case name change effected to Conrad, supra.

The court ultimately upheld the order for the attorneys to return a portion of that fee, where no claim was made for post-filing bankruptcy services. Most significantly, however, the court in analyzing Section 60d, particularly with

reference to Section 64b, did not conclude that the two Sections were in conflict, but rather recognized that the Sections authorize different methods by which the attorney could be paid for services rendered during the bankruptcy proceedings, and specifically observed that Section 60d authorizes a procedure whereby the debtor can insure a reasonable compensation to his attorney for services rendered in connection with the bankruptcy itself.

The United States Supreme Court in Conrad states:

> "Section 60d relates to payments and transfers made by the bankrupt prior to bankruptcy from his own property for services to be rendered to him; section 64b(3) to an allowance to be made for legal services out of the estate under administration ....Section 60d, authorizing a re-examination of payments and transfers by the bankrupt for services to be rendered, has a broader scope." 289 U.S. at 476, 53 S.Ct. at 704. Emphasis supplied.

Probably the most significant observation of the Supreme Court in Conrad concerning the potential applicability of Section 60d is that following:

> "It recognizes the right of such a debtor to have the aid and advice of counsel and, in contemplation of bankruptcy proceedings which shall strip him of his property, to

> make provisions for reasonable compensation to his counsel." 289 U.S. at 478, 53 S. Ct. at 705 (Emphasis supplied.)

To suggest that under the Section such compensation paid to the attorney for "services rendered or to be rendered" does not envision services in connection with the bankruptcy proceeding itself (i.e. following the date of filing) would make the above observation by the Supreme Court meaningless. How could the debtor "make provisions for reasonable compensation to his counsel" if any attempted payment could not validly apply to services rendered subsequent to the date of filing of the bankruptcy petition? The court in Conrad clearly recognizes the availability of Section 60d as an alternative method by which counsel may be compensated. The court additionally and clearly recognizes the control to be exercised over said payments by the court in determining the reasonableness of such payments -- immediately following the sentence last above quoted appears the following observation by the Supreme Court:

> "And, in view of the circumstances, the act makes provision that the bankruptcy court administering the estate may, if the trustee or any creditor questions the transaction, re-examine it with a view to a determination of its reasonableness."

In Conrad, the United States Supreme Court has interpreted Section 60d as it is written and as it was undoubtedly intended to apply. Any suggestion that the statute in specifying that it covers services "to be rendered" does not mean to be rendered in the bankruptcy proceeding itself, constitutes an untenable amendment to the clear and unambigious wording of the Section.

In Conrad the defense was to jurisdiction of the court, and this tact failed. In the instant matter there is no question of the jurisdiction. In Conrad the court observed:

> "The test of jurisdiction, we repeat, is given by the express language of the statute. In the exercise of jurisdiction all questions bearing upon the reasonableness, including the purpose and nature of the services, are open to consideration." Emphasis supplied.

It is significant that the Supreme Court gave no blessing to the "filing date" applicability of 60d, and significantly did not mention time at which the services were rendered or were to be rendered to be an aspect of reasonableness.

Section 60d was interpreted by the United States Court of Appeal for the 6th Circuit in Davis v. Naquin, 357 F. 2d 155 (1966) where the referee ordered cancellation of unreasonable fee burden place on the bankrupt in the form of a

note payable for legal services "to be "rendered" following the bankruptcy, in enabling the appellant Davis to be re-established in business. The attorney had received $283.52 (proceeds of an insurance policy), $400.00 in cash, prior to filing the bankruptcy petition, and a note for $650.00 obtained after filing. The case properly turned on the question of "reasonableness" and no "filing date" concept was employed. The referee held that $450.00 was reasonble for services to the bankrupt in connection with the proceeding and ordered a repayment of $182.52 to the trustee and cancellation of part of the note due by the bankrupt. The United States Supreme Court denied certiorari and thereby upheld the standard of reasonableness.385 U.S. 824, 87 S. Ct. 51 (1966)

Whatever rights the trustee may have for the use of 60d in a Chapter XI proceeding before the Referee must come from the broad language of Section 302 adopting the provisions of Chapters 1 through 7 (Section 1 through 73) "insofar as they are not inconsistent with or in conflict with the provisions of this Chapter" (XI).

There are no reported cases under Section 60d where this section has been applied in a Chapter XI proceeding in progress, and only two cases are found but coming after adjudication when the Chapter XI had collapsed and ordinary bankruptcy ensued.

The nearest precedent in the Eastern District of Louisiana was the similar

named but totally unrelated case of Louisiana Investment and Loan Corp., which commenced as a Chapter XI matter. It is now bankrupt. The total estate ran to approximately $200,000.00 or about one-tenth the size of L.L.&T. Two attorneys for the bankrupt received, prior to filing, a $25,000.00 cash fee for their services. This was mentioned in applicant's testimony in this matter at a figure of $12,500.00 which was known from only one of the two bankrupt's attorneys. The same principal parties who took part in this hearing were involved in that matter. The attorneys for the trustee were Mr. Edward M. Heller, who testified as an expert for applicant, and Mr. Thomas Hartley Kingsmill. Section 60d procedure was brought. It is utterly inconceivable that the attorneys for the trustee in deciding not to bring a 60d proceeding did not consider the after-filing services of the bankrupt's attorneys, but concluded that $25,000.00 was a reasonble amount for pre-filing services only. It is submitted that they properly took the overall view, considered all services rendered, decided that the amount was not out of line and brought no section 60d procedure.

One of the most well considered interpretations of the applicability of Section 60D in this area is set forth by the Honorable Duane J. Kelleher, Referee in Bankruptcy for the Southern District of Ohio, in his paper "Section 60d Proceedings", delivered at the Proceedings of the Third Seminar for Referees in Bankruptcy (1966) p. 459, et seq.:

"The fundamental and primary difference between them is that Section 60d deals with paid fees, and Section 64a(1) deals with unpaid fees. The common and primary pupose of both sections is to assure that a debtor on the verge of or in bankruptcy will be able to arrange for legal counsel, and that such counsel may expect to retain fees paid to him prior to bankruptcy, if his charge was reasonable; and that he may expect to receive reasonable payment for services in the bankruptcy on a priority basis for unpaid fees. In both instances, the matter of reasonableness is determined in the bankruptcy court. As to Section 60d, the question is raised by the court, the trustee or a creditor. The attorney is the respondent--in effect, a defendant and his defense must be that his charge was reasonable. As to Section 64a(1), the question is raised by the attorney. He is the applicant-in effect, a plaintiff and the essential element of his right to recover must be that the amount requested is reasonable.

"Of Section 60d Remington states" *** (It) is both a sword and a shield. It is the former to reach excessive fee payments or deposits against contemplated fees and services, but it is a shield for attorneys

paid in advance for services in bankruptcy and also for attorneys paid in contemplation of bankruptcy for services in other matters, at least to the extent of reasonable value of services rendered therein up to the time of filing of the petition." Vol. 6 Remington p.256. (Emphasis supplied.)

. . . . . .

"I urge that Section 60d not only permits but requires us to allow rentention of reasonable attorney fees paid prior to bankruptcy and in contemplation thereof, no matter what the nature of the legal services performed or to be performed. The test of reasonableness should not be satisfied by undue reliance upon the date of filing. I suggest that the standard to be applied ought to be whether the need for legal counsel at the time of payment was actual rather than fancied, imminent rather than futural, and probably not obtainable unless paid. The attorney's right of retention should not be defeated solely by the fact that some of the needed services were performed shortly after the filing date. Section 60d does not require such construction."

The United States Court of Appeal for the Second Circuit seemingly is the only circuit in which controversies develop regarding attorney's fees.

Despite Conrad, this circuit compounded its long standing error by forcing an unnecessary and undesirable mutual exclusion between Section 60d and Section 64. We have been unable to find decisions from any other Circuit Court, nor from the Supreme Court, which upholds the filing date cutoff of any attorney's right to receive a reasonable fee for services rendered after filing when the attorney has received in advance of filing a fee for services to be rendered in the proceedings. Referee Kelleher admonishes the referees --

> "I urge you to read them carefully before succumbing to any temptation toward utilization of the date of filing as an automatic limitation upon an attorney's right to retain reasonable fees paid prior to filing." (Emphasis by Referee Kelleher)

> "In these cases we find situations where the services in question relate to non-bankruptcy matters, e.g. representation in criminal proceedings (Quinn v. Union National Bank, 32 F.2d 762 (CCA 8th Circ., 1929) and In Re Rolnick, 294 F. 817 (CCA 2nd Cir.); only services rendered prior to the filing of the petition, there being no services rendered after the filing of the petition (In Re Hall, 240 F. Supp. 124 (E.D. Ky. 1965) and Quinn v. Union National Bank, supra); in

another instance to a fee paid after the petition was filed, which clearly would not fall within the pervue of Section 60(d) (In Re Autocue Sales and Distributing Corp., S.D.N.Y. 1958).

"Significantly even the jurisprudence recognizes the liberality of the rule in a line of cases beginning with In Re Kross, 96 F. 816 (D.C.N.Y.), and following to In Re Second, 296 F.231, and In Re Habegger, 139 F.623. Additionally many cases, for example In Re James B. Wood, 210 U.S. 246, 28 S.Ct. 621, 52 L.Ed.1046 (1908); McGee v. Fox, 229 F.395 (1916), In Re Meyer, 1 F.2d 513 (D.C.Tenn. 1924), and In Re A&V Appliance Co., 149 F. Supp. 3 (Ed. N.Y., 1957), consider the entirety of the services rendered and determine a reasonable fee for all services rendered by the attorney.

"We consider the following quotation from In Re Kross, supra, 96 F. 816, at 818, pertinent to this problem:

'This construction is further sustained by subdivision d of section 60, which provides that the "payment of money or transfer of property to an attorney or counselor for services to be rendered in contemplation of the filing of a petition by or against

> a person *** shall be re-examined by the court *** and held valid only for a reasonable amount to be determined by the court, the excess to go to the trustee.'
>
> 'While by the general terms of the act, the debtor is required to turn over all his unexempt property to the trustee an exception is here created in favor of an attorney, to a reasonable amount, for services to be rendered to the debtor in bankruptcy; although this is valid so far only as subsequently approved by the court. The charges to be "approved" are, I cannot doubt, for the same servies which the "fee" is designed to be allowed for under section 64, subd. b, par. 3. Both paragraphs are to be construed together, so that it becomes immaterial in the result whether the attorney obtains his compensation in the first instance from the bankrupt under section 60, refunding what, if anything, is disallowed by the court, or whether he waits for an allowance by the court under section 64.'"

In its decision the Court of Appeal approached the issue by use of certain phrases and sentences from many decisions cited by both parties and basically decided to go along with the Second Circuit.

In Pratt v. Bothe, (1904), 130 Fed.

670 the Sixth Circuit in deciding the case before it, cited Section 60d of the Bankruptcy Act. However the matter before the Court was a petition for an allowance of a fee remaining unpaid. Hence this case was clearly a Section 64 case and, not a Section 60d case. No request to determine reasonableness of the fee for post-filing services was made for the simple reason that no fee had been paid.

Pratt v. Bothe was decided in 1904 in the early years of the Bankruptcy Act which at that time was completely creditor oriented and the two-fold purpose of the Bankruptcy Act, the benefits to the creditors and the relief of the debtor, acknowledged in U.S.F. & G. v. Bray, 225 U.S. 205, 56 L. Ed. 1055, 32 Sup. Ct. 62 and by this Court in MacDonald v. Tefft-Weller Co., 5th Cir., 128 Fed. 381, was not universally acknowledged. In Pratt the Court held:

> "It is unfortunate often, but it has never been tought that property belonging to others, or which might be adjudged to them, should be drawn upon to enable the man to make defence."

The thought that only the solvent are entitled to a defense is rightly condemned by today's Courts.

Further, Pratt v. Bothe, in its reasoning rejected In re Kross, D.C. 96 Fed. 816 which appellant suggests correctly and reasonably interpreted in statute, on the curious suggestion that it (Kross) would be correct except for

the wording including "solicitors in equity or a proctor in admiralty" in the statute. The statute contains no longer such melodious descriptions of attorneys. But it does now contain the word "rendered" which was not in the statute at the time of Pratt, supra. Severe doubt exists therefore, that such a post-filing rule has been adopted in the Sixth Circuit, or whether such would be on another review of Pratt under a genuine Section 60d proceeding. It would seem that such is not the rule in the Sixth Circuit in light of Davis v. Nagin, (1966), 357 F. 2d 155, 385 U.S. 824, 87 Sup. Ct. 51 (Cert.den.).

Viewed in its best light, the Sixth Circuit's interpretation of Section 60d in the case before it was at best dicta. Indeed, this was also true in many of the early cases. Section 60d envisions a proceeding to establish the reasonableness of paid fees. In interpreting the section the Courts were at a loss to find prior jurisprudence on 60d, and reached for cases such as Pratt, supra, and thereby fell into error. This is exactly what happened in the Second Circuit where post-filing rule does seem established. It is submitted that the Sixth Circuit does not have a post-filing services rule under Section 60d emanating from Pratt, supra, and in light of Conrad, Rubin & Lesser v. Pender, 289 U.S.472, 53 S.Ct. 703 (1933) does not now, nor would it apply a post-filing rule.

Such an unnecessary and unwholesome rule that would prevent an attorney from receiving a reasonable fee for services to be rendered after filing in bankruptcy

matters should stand on something more substantial than catch phrases taken from factually different cases.

Even in In re Buchanan et al, 66 F. 2d 416 in which the Second Circuit despite Conrad, supra, saw a postfiling rule no showing was made by the attorneys of post-filing services. The attorneys only attacked the quantum of pre-filing servies. Again the post-filing services "rule" is only dicta.

In finding that "in practice" such a limitation on payment of reasonable fees is present, petitioner suggests that such a finding is not supported by the evidence in this case. Indeed, the trustee's brief concedes such.

> "It is common practice in 'no asset' cases for the attorney representing the bankrupt to ask for his fee in advance." Trustee's Brief, Page 8.

The Tenth Circuit does not recognize such a "practice". See Caldwell v. Valley Nat'l Bank of Phoenix et al, 208 F. 2d 645. The Eighth Circuit seems to reject such "practice", In re Habbegar, 139 Fed. 623.

Petitioner strongly suggests that the Supreme Court in Conrad, supra, correctly interpreted Section 60d, and specifically ruled out such a post-filing rule as would be commenced in the 5th Circuit when it held that Section 60d was applicable to transfers made by a debtor

(1) "in contemplation of the filing of a petition by or against him.

(2) "To an attorney and counsellor at law, solicitor in equity, or proctor in admiralty, and

(3) "for services to be rendered",

to which the 5th Circuit Court would add, unstated in the act and unstated by the Supreme Court:

"until the date of filing".

Bankruptcy cases, particularly arrangements under Chapter XI and reorganizations under Chapter X are frequently protracted and time consuming. To hold that a lawyer may not receive and expect to retain reasonable fees charged prior to filing for services to be rendered after filing is unconscionable, and almost guarantees failure of the method.

If the rehabilitation of the bankrupt is to be achieved, it can only be done with the aid and assistance of a lawyer who will stick with him throughout the proceedings, obtaining for him a full recognition of his exemptions, and seeing that the discharge is obtained and defended. If this Court severs the attorney-client relationship at the day of filing it condemns thereby the 92.7% of the bankrupts to fend for themselves after filing against the overreaching creditor who asserts mortgages over exempt household furnishings, tools of trade, etc.,

and who do not hesitate to threaten spurious opposition to a bankrupt's discharge.

Unwarranted holdings such as the no-fee for post-filing services can have no effect other than to insure mediocre representation for the bankrupt before the Bankruptcy Court. It will further diminish the price-per-pound, dollar-per-hour reputation of the Bankruptcy Court.

The rule which separates a lawyer from his reasonable fee is unjust will undoubtedly not be applied by reasonable Referees, or, worse yet, will be selectively applied just as it was in the Louisiana Loan and Thrift case, and not in the Louisiana Investment and Loan case, as noted by petitioner.

It is suggested that the plain, and just interpretation of Section 60d requires no more than an attorney in charging for his bankruptcy services meet a reasonable standard of quantum. This is what petitioner was called upon and came prepared to do.

No one can deny the necessity and desirability of obtaining back from the gouging lawyer unreasonable fees for representation in bankruptcy, but what conceivable advantage can there be in obtaining back reasonable fees? Clearly in establishing such a rule as the Referee advocates, it should first bear in mind that the relative peace and harmony between the bench and bar will be upset because of the change itself. Attorneys, where fees are available for payment, have until now universally collected such in advance for services "to be rendered" after filing.

Indeed in the 92.7% of the bankruptcy docket which are "no-asset" cases, fees are invariably taken in advance. If the Referee's position is correct and all attorney fees must come from an application under Section 64, what when the estate is an empty bag? What then of the debtor's right recognized in Conrad "to have the aid and advice of counsel, and, in contemplation of bankruptcy proceedings which shall strip him of his property to make provisions for reasonable compensation to his counsel"?

Additionally in appealing to the Court of Appeals, the petitioner sought a review of the order of the Referee in Bankruptcy dated August 7, 1968. In no manner did petitioner agree with any part of such order. Consequently the question of quantum should have been reviewed. Certainly the complexity and size of the case brought into Court fully justify the payment of a fee commensurate with the undertaking and to be measured by all proper and ethical standards. Such was not done in the instant matter. And such is directly attributable to the denial of oral argument.

The petitioner herein respectfully suggests that the question posed is indeed one of apparent gravity since it strikes at the heart of a bankrupt's right to counsel, and is an important question of federal law which has been decided in clear conflict with the full review of the question by this Court in Conrad, supra.

Petitioner prays to this Court issue writs of certiorari and review to the end that all questions posed in this petition are fully reviewed and decided in accordance with law.

Respectfully submitted,

DOYLE, SMITH, DOYLE,
GORDON, ARATA & WATTERS
Suite 2303 - 225 Baronne St.
New Orleans, Louisiana 70112

By:_____
Blake G. Arata

CERTIFICATE

I certify that a copy of the above and foregoing Brief has been served this day upon counsel for the Albert G. Reynolds, Trustee, herein by mailing a copy of same to Mr. Thomas Hartley Kingsmill, his office, 527 Carondelet Street, New Orleans, Louisiana, 70130 and to Mr. Herbert W.Christenberry, Jr., at his office in the National Bank of Commerce Bldg., New Orleans, Louisiana.

New Orleans, Louisiana,
December _____, 1969.

_____
Blake G. Arata

APPENDIX A

REFEREE'S OPINION, FINDINGS OF FACT, and ORDER

INTRODUCTORY STATEMENT

On April 24, 1968, the debtor filed its petition and schedules under Chapter XI of the Bankruptcy Act. Mr. John M. Holahan signed the petition as attorney for the debtor corporation.

Subsequently this Court learned from an indirect source that Mr. Holahan was paid a fee of $20,000 prior to the filing of the Chapter XI proceedings. Mr.Holahan concealed this fact from this Court, from the Board of Directors (with the exception of the president, Mr. Charles H. Ritchey), and from the creditors. Schedule B-4, Property in Reversion, etc., under the heading "Attorney's Fees," was left blank in the original schedules prepared and filed by Mr. Holahan and signed by Mr. Ritchey.

Not until June 10, 1968, were the schedules amended to reflect this payment, and the amendment (Pleading 18A) reads as follows:

> "John N. Holahan, attorney, paid a retainer for services and representation required by Louisiana Loan & Thrift Corporation as debtor prior to filing and in contemplation of further services required after filing as debtor and as attorney for the debtor in possession operating the

business. Such amount includes costs. $20,000.00"

The resolution of the Board of Directors dated April 24, 1968, copy of which was filed with the original schedules, authorizing Mr. Charles H. Ritchey, President, to file the Chapter XI proceeding and to employ Mr. John N. Holahan, reads in part as follows:

> ". . . and that Charles Ritchey be authorized and directed to retain John Holahan as legal counsel to represent Louisiana Loan & Thrift with the filing in Federal Court and to pay which shall be approved by the Federal Judge and Referee to whom the Petition is allotted.
>
> "Mr. Anzelmo, legal counsel for Louisiana Loan & Thrift, is to assist John Holahan."

On June 17, 1968, a petition was filed by the Receiver (Pleading 21) for a determination by this Court of the reasonableness of the $20,000 fee paid to Mr. Holahan for his legal services, as provided by Section 60d of the Bankruptcy Act.

A hearing on this petition was held on July 10, 1968, testimony taken and briefs submitted on behalf of Mr.Holahan and the Receiver.

The sole question involved in this 60d proceeding is a determination by this

Court of the reasonable value of the services rendered by Mr. Holahan prior to the filing of the Chapter XI proceeding.

The Court, after due consideration of the evidence, the nature of the proceedings, the amount involved, the experience of counsel and the time consumed (68 hours for services rendered prior to the filing of the petition, as testified by Mr. Holahan (Tr. p.12), and after due deliberation of the law, enters the following:

FINDING OF FACT

The Court finds that the $20,000 fee paid to John M. Holahan, attorney, shortly before the filing of the Chapter XI proceding was paid in contemplation of the filing of said petition and is, therefore, subject to an examination by this Court.

The Court further finds that the services rendered by Mr. Holahan prior to the filing of the Chapter XI proceeding consisted principally of conferences, research, advice, assisting in the preparation of and the filing of schedules, and petition and order for authority to operate the business as debtor in possession. (Tr. pp. 12,13 and 14)

The Court further finds and determines that a reasonable fee for the services actually rendered by John M. Holahan as attorney for debtor prior to the filing of the Chapter XI proceeding, is the sum of $3,000.

CONCLUSION

The Court is of the opinion that the provisions of Section 60d of the Bankruptcy Act are not inconsistent with nor in conflict with the provisions of Chapter XI, and therefore apply in these proceedings.

The Court is further of the opinion that an allowance of a fee at this time can only cover the reasonable value of services rendered by Mr. Holahan prior to the filing of the petition for a Chapter XI proceeding, and that any application for fees for services rendered subsequent to the Chapter XI filing either as attorney for the debtor in possession or as attorney for the debtor must necessarily be made in the future, either after the confirmation of a plan or after an adjudication and administration of the estate.

ORDER

IT IS, THEREFORE, DECREED AND ORDERED that the payment of Twenty Thousand ($20,000) Dollars to John M. Holahan is valid only to the extent of Three Thousand ($3,000) Dollars, and that the excess of Seventeen Thousand ($17,000.00) Dollars shall be paid forthwith by him to Mr. John A. Bennett, Receiver of Louisiana Loan & Thrift Corporation, for the benefit of the estate.

Entered at New Orleans, Louisiana, on this the 7th day of August, 1968.

signed: P. M. Flanagan
P. M. Flanagan
Referee in Bankruptcy

APPENDIX B

ORDER DENYING PETITION FOR REVIEW

Pursuant to the stipulation of counsel for John M. Holahan, Esq., petitioner for review of the order of the Honorable P. M. Flanagan, Referee in Bankruptcy, entered on August 7, 1968 in the Chapter XI proceedings heretofore had herein, and counsel for Albert G. Reynolds, Esq., the Chapter X Trustee herein, this matter was submitted to the Court for adjudication upon the record in the Chapter XI proceedings, the Referee's certificate, dated September 23, 1968, and the written memoranda of counsel for the parties.

After considering said record, certificate and memoranda, the Court is of the opinion that the Referee's findings of fact and conclusions of law are not clearly erroneous. On the contrary, they are emply supported by the record, the evidence and the applicable law and are accepted by the Court.

Accordingly, IT IS ORDERED that

1. The petition for review be, and it is hereby, DENIED.

2. The order of the Honorable P. M. Flanagan, Referee in Bankruptcy, entered on August 7, 1968 and the subject of said petition for review be, and it is hereby, AFFIRMED.

s/ Edw. J. Boyle, Sr.
United States District Judge.

New Orleans, Louisiana
January 15, 1969.

APPENDIX C

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 27374

Summary Calendar

IN THE MATTER OF:
LOUISIANA LOAN AND THRIFT CORPORATION
JOHN M. HOLAHAN,

Appellant,

versus

ALBERT G. REYNOLDS, TRUSTEE,

Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

---

(August 27, 1969)

Before BROWN, Chief Judge, THORNBERRY and MORGAN, Circuit Judges.

MORGAN, Circuit Judge: Pursuant to new Rule 18 of the Rules of this court, we have concluded on the merits that this case is of such character as not to justify oral argument and have directed the clerk to place the case on the Summary Calendar and to

notify the parties in writing. See *Murphy* v. *Houma Well Service*, 5 Cir., 1969, 409 F. 2d 804, Part I.

This is an appeal from the Eastern District of Louisiana affirming an order of the Referee in Bankruptcy issued in a proceeding under Section 60(d) of the Bankruptcy Act, 11 U.S.C. § 96(d).

John M. Holahan, the attorney for the bankrupt and the appellant in this case, was paid a fee of $20,000.00 by the debtor, Louisiana Loan and Thrift Corporation, prior to the filing of the Chapter XI proceeding. A petition was filed by the Receiver in the reorganization proceeding for a determination by the Referee of the reasonableness of the $20,000.00 fee paid to Mr. Holahan for his legal services, as provided by Section 60(d) of the Bankruptcy Act. The Referee held "that an allowance of a fee at this time can only cover the reasonable value of services rendered by Mr. Holahan *prior to the filing* of the petition for a Chapter XI proceeding" (emphasis supplied), and found "that a reasonable fee for the services actually rendered by John M. Holahan as attorney for the debtor, prior to the filing of the Chapter XI proceeding, is the sum of $3,000.00. The services Mr. Holahan rendered prior to the filing of the Chapter XI proceeding consisted principally of conferences, research, advice, assisting in the preparation of and the filing of schedules, and petition and order for authority to operate the business as debtor in possession. The Referee also found that the fee paid Mr. Holahan prior to the filing of the Chapter XI petition was paid in contemplation of the filing of a petition in bankruptcy and, thus, was subject

to examination by the Referee under Section 60(d). The District Court affirmed.

The attorney Holahan contends that a proceeding under Section 60(d) relates to the reasonable value of the legal services rendered by the debtor's attorney both *before* and *after* the filing of a petition in bankruptcy, and that the Referee committed error by not determining the reasonable value of the legal services he had rendered to the Louisiana Loan and Thrift Corporation up to the date of the Section 60(d) proceeding. Holahan in no way attacks the jurisdiction of the Referee. Likewise, he neither contends that the fee was not paid in contemplation of filing a petition in bankruptcy nor that the Referee's finding that the reasonable value of the legal services he rendered the debtor corporation is clearly erroneous.

Thus, the only issue facing this Court is whether, in a proceeding under Section 60(d) of the Bankruptcy Act reviewing the reasonableness of attorney's fees paid in advance of filing the bankruptcy petition, the Referee in Bankruptcy can take into account legal services rendered to the bankrupt after the bankruptcy petition has been filed.[1]

---

[1]Section 60(d), 11 U.S.C. § 96(d), as amended (1963), provides:

> If a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney at law, for services rendered or to be rendered, the transaction may be examined by the court on its own motion or shall be examined by the court on petition of the trustee or any creditor and shall be held valid only to the extent of a reasonable amount to be determined

In describing Section 60(d), the Supreme Court has said:

> That provision has been held to be sui generis. It does not contemplate a plenary suit, but a summary proceeding. (Citing *In Re Wood*, 210 U.S. 246, 251, 253 (1908)). The class of cases to which it refers is not that of preferences or of fraudulent conveyances... The provision authorizes reexamination of payments or transfers when made by a debtor (1) "in contemplation of the filing of a petition by or against him," (2) "to an attorney and counselor at law, solicitor in equity, or proctor in admiralty,"[2] and (3) "for services to be rendered."

---

by the court, and the excess may be recovered by the trustee for the benefit of the estate.

If, whether before or after filing, a debtor shall agree orally or in writing to pay money or transfer property to an attorney at law after the filing, the transaction may be examined by the court on its own motion or shall be examined by the court on petition of the bankrupt made prior to discharge and shall be held valid only to the extent of a reasonable amount to be determined by the court, and any excess obligation shall be canceled, or if excess payment or transfer has been made, returned to the bankrupt.

[2]This language is taken from the original version of Section 60(d). Section 60(d) of the Bankruptcy Act of 1898, 30 Stat. 562, provided:

If a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney and counselor at law, solicitor in equity, or proctor in admiralty for services to be rendered, the transaction shall be reexamined by the court on petition of the trustee or any creditor and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate.

> Such payments or transfers are only to "be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate." *Conrad, Rubin & Lesser v. Pender*, 289 U.S 472 (1933).

This Court has never been called upon to decide the issue presented by this case. The Second and the Sixth Circuits, however, have taken the position that Section 60(d) relates only to attorney's fees for legal services to be rendered while the debtor is in contemplation of bankruptcy and not to legal services to be rendered after the bankruptcy proceedings are commenced, that is to say, after the petition in bankruptcy has been filed. *Pratt* v. *Bothe*, 6 Cir., 1904, 130 F. 670; *In re Rolnick*, 2 Cir., 1923, 294 F. 817; *In re Falk*, 2 Cir., 1929, 30 F. 2d 607; *In re David Bell Scarves*, 2 Cir., 1932, 61 F.2d 771, aff'd. 289 U.S. 472 (1933); *In re Buchanan*, 2 Cir., 1933, 66 F. 2d 416. In explaining this position, the Court in *In re Buchanan*, supra, said:

> The words, "for services to be rendered", in section 60(d) have in practice been construed as covering all services "to be rendered" in contemplation of the filing of a petition in bankruptcy... 66 F. 2d at 419.

In affirming *In re David Bell Scarves*, supra, the Supreme Court apparently did not consider the issue which we decide here, but said in the course of its decision:

> Section 60(d) relates to payments and transfers made by the bankrupt prior to bankruptcy from his own property for services to be rendered to him; section 64(b) (3)[3] to an allowance to be made for legal services out of the estate under administration. (Citing *In re Rolnick* supra). The services within the latter provision are those rendered in aid of the administration of the estate and the carrying out of the provisions of the Act. (Citing cases). *Conrad, Rubin & Lesser v. Pender*, supra, 289 U.S. at 476.

More recently, the Second Circuit position has been followed in the case of *In re Autocue Sales & Distributing Corp.*, S.D.N.Y., 1958, 167 F. Supp. 672, where the district court held that Section 60(d) "applies only to services rendered before the date of bankruptcy". At 674. See also *Haar* v. *Oseland*, 2 Cir., 1959, 265 F. 2d 219.

We are persuaded that the position taken by the Second Circuit is correct. We, therefore, hold that Sec-

---

[3]Section 64(b) (3) is the predecessor of Section 64(a) (1), 11 U.S.C. § 104(a) (1), as amended (1967), which provides:

(a) The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of the bankrupt estates, and the order of payment, shall be (1) the costs and expenses of administration, including the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition; . . . and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the bankrupt in voluntary and involuntary cases, and to petitioning creditors in involuntary cases. . . .

tion 60(d) of the Bankruptcy Act relates only to legal services to be rendered in contemplation of bankruptcy and *not* to legal services to be rendered *after* the petition in bankruptcy has been filed.

The judgment of the District Court is AFFIRMED.

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APPENDIX D

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1968

No. 27374

D. C. Docket No. 68-729-Bankruptcy

In the Matter of: LOUISIANA LOAN AND THRIFT CORPORATION,

JOHN M. HOLAHAN,
Appellant
versus

ALBERT G. REYNOLDS, Trustee
Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before: BROWN, Chief Judge, THORNBERRY and MORGAN, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was taken under submission upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that appellant pay to appellee the costs on appeal to be taxed by the Clerk of this Court.

August 27, 1969

Issued as Mandate: October 14,1969.

...o0o...

APPENDIX E

ORDER OF COURT OF APPEALS
DENYING PETITION FOR REHEARING

No. 27374
Summary Calendar

In The Matter of:
LOUISIANA LOAN AND THRIFT CORPORATION
JOHN M. HOLAHAN
Appellant,

versus

ALBERT G. REYNOLDS, Trustee
Appellee.

(October 6, 1969)

Before BROWN, Chief Judge, THORNBERRY and MORGAN, Circuit Judges.

PER CURIAM:

This is a petition for a rehearing of the Court/s decision in In re Louisiana Loan and Thrift Corp., Holahan v. Reynolds, 5 Cir., 1969 ____F.2d_____[No. 27,374, August 27, 1969]. The petition is denied.

The petition points out that we misstated the appeallant's contentions by reporting that:

> "The attorney Holahan contends that a proceeding under Section 60(d) relates to the reasonable value of legal services rendered by the debtor's attorney both before and after the filing of a petition in bankruptcy, and that the referee committed error by not determining the reasonable value of the legal services he had rendered to the Louisiana Loan and Thrift Corporation up to the date of the Section 60(d) proceeding." (Emphasis supplied)

It is the petitioner's position that the Section 60(d) proceedings should determine the reasonable value of all services to be rendered, including the services that remain necessary after the Section 60(d) hearing is had. This slight misstatement of the appellant's contention, however, in no way affected the outcome of the decision in light of our holding that Section 60(d) relates only to the reasonable value of the legal services rendered to the debtor prior to the filing on a petition in bankruptcy.

The appellant never contended that the valuation by the referee of legal services rendered to the debtor prior to the filing was clearly erroneous, and thus it will do him no good to argue in his petition for rehearing that he would have made such a contention had he known the Court would decide as it did.

The Court in no way misapprehended the nature of appellant's contentions. The petition for rehearing is

DENIED.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

NUMBER 909

IN THE MATTER OF:
LOUISIANA LOAN AND THRIFT CORPORATION,
JOHN M. HOLAHAN,
Petitioner,

versus

ALBERT G. REYNOLDS, Trustee
Respondent.

On Petition for Writ of Certiorari to
the United States Court of Appeals
for the Fifth Circuit

Respondent's Brief in Opposition

HERBERT W. CHRISTENBERRY, JR.
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American Bank Building
New Orleans, Louisiana 70130

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

NUMBER 909

IN THE MATTER OF:
LOUISIANA LOAN AND THRIFT CORPORATION,
JOHN M. HOLAHAN,

Petitioner,

versus

ALBERT G. REYNOLDS, Trustee

Respondent.

On Petition for Writ of Certiorari to
the United States Court of Appeals
for the Fifth Circuit

Respondent's Brief in Opposition

STATEMENT OF THE FACTS

Petitioner's statement of facts is correct and respondent supplements same only to the point of adding specifics. The fee of $20,000.00 was paid to Mr. Holahan on April 24, 1968, the same day he filed the Chapter XI petition and asked that the debtor be retained in possession. (R.

15) Attached to the said petition is a resolution of the Board of Directors of Louisiana Loan & Thrift Corporation dated April 24, 1968, which reads in part as follows:

> "And that Charles Ritchey be authorized and directed to retain John Holahan as legal counsel to represent Louisiana Loan & Thrift with the filing in Federal Court and to pay a fee which shall be approved by the Federal Judge and referee to whom the petition is allotted. Mr. Anzelmo, legal counsel for Louisiana Loan & Thrift, is to assist John Holahan." (R. 42)

ARGUMENT

Respondent will offer argument to the questions for review in the same order as petitioner.

"On lack of opportunity to orally argue:"

Petitioner's argument herein cannot be consistent and sincere with his prior action. Upon the Court of Appeals for the Fifth Circuit rendering a decision adverse to petitioner, he complains of being deprived of his rights and the emasculation of the appeal process because there was no oral argument. Yet on his application for a review of the referee's decision herein to the district court, he entered into a stipulation that the cause be submitted on the record *without oral argument.* (R. 130) Upon this stipulation the district court ordered the matter submitted without oral argument. (R. 131)

The United States Court of Appeals for the Fifth Circuit previously has had occasion to consider this same issue of oral argument on appeal in Murphy v. Houma Well Service, 5th Cir., 1969, 409 Fed. 2d 804. In the

yet unreported opinion rendered on October 7, 1969 by Chief Judge John R. Browne of the Fifth Circuit in James Leo Huth vs. Southern Pacific Company, he devoted a portion of same to outline and update that court's practices and procedures in screening classification of cases, including disposition on the summary callendar without oral argument. He states:

"In this process of discriminating selectivity, the Court, in its continuing self-education from cumulative experience in the shaping of this new judicial tool, strives to meet both the literal demands and, more important, the underlying spirit of F.C.C. v. WJR, The Goodwill Station, Inc., 1949, 337 U.S. 265, 274-77, ... S. Ct. ....., ... 93 L. Ed. 1353, 1360-61.

There the Court, rejecting the Court of Appeals' holding that oral argument is required to satisfy the Constitution, said, "Taken at its literal and explicit import, the Court's broad constitutional ruling cannot be sustained." Any such conclusion, the Court went on, "would require oral argument upon every question of law * * * regardless of whether the legal question were sustantial or insubstantial; of the substantive nature of the asserted right or interest involved; of whether Congress had provided a procedure, relating to the particular interest, requiring oral argument or allowing it to be dispensed with * * *." And then declining to explore the administrative consequences of any such holding, the Court declared, "It is enough to say that due process of law, as conceived by the Fifth Amendment, has never been cast in so rigid and all-inclusive confinement."

The Court then proceeded to emphasize the discriminating nature of the problem. "On the contrary, due

process of law has never been a term of fixed and invariable content. This is as true with reference to oral argument as with respect to other elements of procedural due process. For this Court has held in some situations that such argument is essential to a fair hearing, Londoner v. Denver, 210 U.S. 373, 52 L. Ed. 1103, 28 S. Ct. 708, in others that argument submitted in writing is sufficient. Morgan v. United States, 298 U. S. 468, 481, 80 L. Ed. 1288, 1295, 56 S. Ct. 906. See also Johnson & Wimsatt v. Hazen, 69 App. D.C. 151, 99 F.2d 384; Mitchell v. Reichelderfer, 61 App. D.C. 50, 57 F.2d 416."

The appeal court herein, after judicially screening this case, correctly determined that it possessed no substantial question of procedural or substantive federal law and that the argument submitted in writing was sufficient.

ON THE MERITS

On August 7, 1968 the Referee in Bankruptcy rendered his order fixing the compensation of Mr. Holahan at $3,000.00. (R. 120) Thereafter, a review was taken to the District Court by Mr. Holahan, and in accordance with General Order 47 in Bankruptcy of the Supreme Court of the United States, the District Court affirmed the order of the Referee. General Order 47 provides:

> "Unless otherwise directed in the order of reference, the report of the referee or special master shall set forth his finding of fact and conclusions of law, and the judge shall accept his findings of fact unless clearly erroneous. The judge after may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions."

The Honorable Edward J. Boyle, Sr., in affirming the Referee's ruling, stated:

> "After considering said record, certificate and memorandum, the Court is of the opinion that the Referee's finding of fact and conclusions of law are not clearly erroneous. On the contrary, they are amply supported by the record, the evidence, and the applicable law and are accepted by the Court." (R. 132)

No one denies Mr. Holahan's right to reasonable compensation for services rendered in these proceedings, but the manner and means in which he chose to compensate himself is contested.

Mr. Holahan in amending the schedules on June 10, 1968, (R. 116-117) after the appointment of a receiver, to disclose for the record his fee payment set forth that it included services as attorney for the debtor in possession. It should be noted that the debtor corporation and the debtor in possession are two distinct categories and are not synonymous. The court alone has the final determination of any action taken by a debtor in possession. Hence, the board of directors by prior action could not bind the court. A reading of the resolution attached to the petition clearly shows that such was not the intent of this board. Its desire was to provide for compensation for its attorney, but only subject to the approval of the court.

The examination of the propriety and reasonableness of Mr. Holahan's fee was brought by the receiver under Section 60(d) of the Bankruptcy Act.

Section 60(d) is applicable to Chapter XI arrangement proceedings.

> "Section 60(d) of the act is applicable for re-examination of prepayments to attorneys in conjunction with arrangement and corporate reorganization proceedings as well as ordinary bankruptcies."
>
> *Re: Shapera 869 2d 506, 32 ABR 508 (1936 CA Ill.), Remington Vol. 6, Sec. 2703, p. 254.*

Careful consideration should be given to the distinction between Sections 60(d) and 64(a) of the Bankruptcy Act. These sections read as follows:

> *Section 60(d) 11 U.S.C.A. 96(d):*
>
> d. If a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney at law, for services rendered or to be rendered, the transaction may be examined by the court on its own motion or shall be examined by the court on petition of the trustee or any creditor and shall be held valid only to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate.
>
> If, whether before or after filing, a debtor shall agree orally or in writing to pay money or transfer property to an attorney at law after the filing; the transaction may be examined by the court on its own motion or shall be examined by the court on petition of the bankrupt made prior to discharge and shall be held valid only to the extent of a reasonable amount to be determined by the court, and any excess obliga-

tion shall be canceled, or if excess payment or transfer has been made, returned to the bankrupt."

Section 64(a) 11 U.S.C.A. 104:

"Debts Which Have Priority. (a) The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment shall be . . . and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the bankrupt in voluntary and involuntary cases, and to the petitioning creditors in involuntary cases . . ."

Collier on Bankruptcy clearly covers the distinction between the two sections and sets forth a list of citations to support the position that only services rendered by an attorney prior to the filing of the petition in bankruptcy should be considered in determining the reasonableness of the fee paid.

Collier, Vol. 3, p. 1143:

"It is important, however, in any treatment of Section 60d to distinguish it from Section 64a(1). The latter section covers only those services rendered in aid of the administration of the estate and the carrying out of the provisions of the Act, whereas the scope of Section 60d is broader, not being so limited to a particular class of legal services. An additional distinction between the two provisions is that Section 60d covers only payments or transfers actually made for services rendered prior to the commencement of bankruptcy proceedings; compensation for services rendered but not paid for prior to bank-

ruptcy, and compensation for services rendered after that time can not be allowed in proceedings under Section 60d, but must be sought either under Section 64a(1), or as a general claim." Matter of Klein-Moffett Co. ,(D.C., Md.) 12 Am. B.R. (NS) 422, 27 F. (2d) 444; Matter of Falk (C.C.A., 2d Cir.), 13 Am. BR (N.S.) 515, 30 F. (2d) 607; Quinn v. Union Nat. Bank (C.C.A., 8th Cir.), 13 Am. B.R. (N.S.) 628, 32 F. (2d) 762, Matter of Buchanan (C.C.A., 2d Cir.), 23 AM. B.R. (N.S.) 564, 66 F. (2d) 416, cert. den. 290 U.S. 682, 54 S. Ct. 120, 78 L. Ed. 588; Slattery v. Dillon (C.C.A., 9th Cir.), 9 Am. B.R. (N.S.) 298, 17 F. (d) 347; Pratt v. Bothe (C.C.A., 6th Cir.), 12 Am. B. R. 529, 130 Fed. 670; Matter of Rolnick (C.C.A., 2d Cir.), 2 Am. B. R. (N.S.). 175, 294 Fed. 817; See In re Autocue Sales & Distributing Corp. (S.D.N.Y., 1958) 167 F. Supp. 672.

In the case of *Haar v. Oselnad (In re: Knickerbocker Leather vs. Novelty Co. Inc.) 265 F. 2nd 218 (C.C.A. 2 1959)*, the court held:

> "Where attorney, pursuant to agreed retainer of $2,500.00, filed petition for arrangement and received $1,000.00 and assignment of accounts receivable which yielded $1,500.00, and contemplated arrangement failed and bankruptcy ensued attorney was properly allowed $500.00 for his pre bankruptcy services and bankruptcy trustee was properly allowed to recover the balance for the benefit of the estate."

In this case the pre bankruptcy date referred to was the date on which the arrangement proceeding was filed. The court also did not preclude an application

for an allowance as an expense of the administration of the estate.

In the publication of the Proceedings of Fifth Seminar for Referees (1968) p. 55 et. seq. there is a discussion of fees in a Chapter XI proceeding and the compensation of attorneys for debtor corporations. An attorney for the debtor corporation is allowed compensation even though a plan may not be approved in a Chapter X. However, this varies from Chapter XI which precludes compensation where no arrangement is confirmed, unless the court can find that such services were beneficial to the estate.

In the case now before the court the debtor corporation has made the judicial admission that a plan of arrangement could not be effected and asked that the proceedings be shifted to Chapter X. From the reasoning set forth in the before mentioned Referee's Seminar, it would follow that it is up to the court to determine if Mr. Holahan's services were beneficial to the estate and if he should be compensated.

In place and stead, Mr. Holahan has chosen to fix and pay his own compensation without regard of the court, the debtor corporation or the creditors of this estate. To allow such a practice would create a dangerous precedent.

To support his position he relies on the Supreme Court case of *Conrad, Rubin and Lesser v. Pender 289 U.S. 472, 53 S. Ct. 703 (1933)* and also a paper given by Referee Kelleher and included in the Proceedings of the Third Seminar for Referees in Bankruptcy (1966).

We offer no argument to the *Conrad case* and the basic law which it contains. However, it should be pointed out that this case was decided in 1933 and as petitioner himself points out in his brief, Chapter XI first came into the Bankruptcy Act in 1938. In that year the Chandler Act was passed which effected great changes in the bankruptcy law and every bankruptcy practioner knows that you must be very careful in the consideration of cases prior to 1938.

The law set forth in the Conrad case is sound as far as it goes. Petitioner is now trying to read something into the case which is not there. This case did not deal with a situation which was anyway similar to the instant case.

In this case, Mr. Holahan knew that a debtor in possession was contemplated and he was well aware of the assets of the corporation. The conrad case distinguishes between Section 60(d) and 64b (now Section 64a) of the Bankruptcy Act, but it does not hold that Section 60(d) is another method of paying an attorney for his services. Instead of a method of payment it was and is intended as a safeguard against the payment of unreasonable fees.

It is common practice in "No Asset" cases for the attorney representing the bankrupt to ask for his fee in advance. In preparing the bankrupt's schedules he discloses the fee and if the court itself or any creditor believes it unreasonable they can under Section 60(d) examine same. Section 60(d) does not authorize or even suggest payments in advance. It is a sub-paragraph of Section 60 which generally deals with preferential payments and the recovery of same.

Any attempt to equate small bankruptcy cases or "No Asset" cases with the present case is absurd. The Conrad case in recognizing the right of a bankrupt to have the aid and advice of counsel and pay him a reasonable compensation for his services envisioned a situation where the bankrupt was without assets or in a nominal amount.

Every case must be decided on its own set of facts. A reading of that portion of Referee's Kelleher's papers as quoted by petitioner in his brief to this court is in accord with the Trustee's position regarding Section 60(d) and 64a(1). It also is not in conflict with the Referee Flanagan's position. Referee Kelleher says:

> "The attorney's right of retention should not be defeated solely by the fact that some of the needed services were performed *shortly after* the filing date." (Emphasis supplied)

Referee Kelleher contemplated a straight bankruptcy and attendance of counsel at the first meeting of creditors after the petition was filed. He did not contemplate a Chapter X or Chapter XI proceeding. If he had the present case before him with a corporate resolution for the court to approve the compensation of the debtor's attorney, and the immediate appointment of a debtor in possession, Referee Kelleher would have restricted the hearing to only those services rendered up to the date of filing.

The Referee's ruling in this matter is not invariance with the established law in this district or any other. It certainly does not hold that an attorney cannot receive in advance a reasonable fee for his services in a straight bankruptcy with nominal or no assets. Nor does it hold that in substantial matters that an attorney cannot be

compensated in advance for preliminary work in a proceeding according to his experience, ability and the complexity of the case. However, it will not allow a court appointed attorney for a debtor in possession to fix his own fee without the knowledge or approval of the court. It is the obligation and duty of the court to examine and supervise the administration of those cases referred to it.

In the matter of *Imperial "400" National, Inc. et al 274 F. Supp. 351 (1967)*, the court said:

> "The reasonableness of a fee received is a matter for the court to determine and the determination of whether or not the fee was unreasonable in amount should be made as soon as practicable after the filing of the petition."

and further stated:

> "Transfer of assets of a debtor, prior to filing arrangement proceeding not made in regular course of business, and not readily discoverable from the corporate records, is not to be encouraged by awarding fees to attorneys to whom such transfers have been made."

The Imperial National case involved an examination by a Chapter X trustee of excessive attorney fees paid to the debtor's attorney in connection with a Chapter XI proceeding which aborted. The court ordered that sums paid to attorneys for services in connection with arrangement petition before the petition was filed be refunded to the trustee and held that application for allowance for services rendered before and after the filing of the petition may be made after the plan of reorganization is approved or the proceedings otherwise terminated.

Mr. Hoahan invites the court's attention to the *Louisiana Investment and Loan Corporation* case No. 63-801 In Bankruptcy, United States District Court for the Eastern District of Louisiana, New Orleans Division (unreported), which is still an open case under reference to Referee E. E. Talbot, as a precedent herein. The only testimony concerning this case given in this hearing before the Referee was by Mr. Holahan and that to the effect that the attorney for the debtor corporation received a fee of twelve-odd thousand dollars. (R. 65) Later in the testimony Edward Heller testified that the attorneys for the trustee considered filing a rule to test the reasonableness of the fee but it was never filed. (R. 93) The only reason for now mentioning it to the court is to have the record show that the amount in question in the Louisiana Investment and Loan Corporation case was some twelve thousand-odd dollars as Mr. Holahan testified and not the sum of twenty-five thousand dollars he states in his brief at page 12. Other statements of Mr. Holahan in this regard are matters of conjecture and are not supported by the record herein or the record of Louisiana Investment and Loan Corporation. The factual situation in this case is entirely different from the Louisiana Investment and Loan Corporation case, none of which has been presented in this proceeding. Appellant in his brief at page 12 correctly stated that Edward M. Heller and Thomas Hartley Kingsmill were the attorneys for the trustee in the Louisiana Investment and Loan Corporation case. The latter is one of the counsel for the trustee herein and entirely familiar with the facts, circumstances and considerations in both cases.

There has been no error by the referee in his findings of fact or conclusions of law. In the instant case the

referee properly applied the provisions of Section 60(d) to the factual situation and determined that Mr. Holahan was without right to fix and pay himself a fee of $20,000.00 without application and approval of the court. The Referee considered all factors in this matter and determined that reasonable compensation was $3,000.00 and ordered the remaining $17,000.00 to be paid forthwith to the receiver. The District Court concurred and affirmed the Referee. In turn the United States Court of Appeals for the Fifth Circuit affirmed the District Court. It is respectfully submitted that there is no substantial question of procedural or substantive federal law presented to warrant the granting of writs of certiorari herein.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be denied.

Respectfully submitted,

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CERTIFICATE

I certify that a copy of the above and foregoing brief has been served this day upon counsel for the petitioner, John M. Holahan, by mailing a copy of same to Blake G. Arata, of the law firm of Doyle, Smith, Doyle, Gordon, Arata & Watters, Suite 2303, 225 Baronne Street, New Orleans, Louisiana 70112.

New Orleans, Louisiana, this ..... day of December, 1969.

HERBERT W. CHRISTENBERRY, JR.